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Labor-Antitrust Principles Applicable to Joint Labor-Management Conduct

William C. Zifchak*

I. INTRODUCTION

Most of the recent labor-antitrust litigation has centered on joint union-management conduct, and in particular collectively bargained agreements. In my remarks I will review the labor-antitrust principles governing joint conduct, sometimes characterized by the misnomer, the "non-statutory" exemption, and then zero in on collective bargaining agreements. Bill Keller, who is sharing the podium with me on this section, will address the area of non-collectively bargained agreements, and in particular the "hot cargo" agreement analyzed by the Supreme Court in Connell Construction Co. v. Plumbers & Steamfitters Local 100.1

To better understand these principles, it would be helpful that you know my own views at the outset. Stated briefly, as a matter of proper statutory construction and sound public policy, the labor exemption should be broadly construed to encompass all collective bargaining agreements that do not have both a clear purpose to impose a direct restraint in a product market and a demonstrable anti-competitive effect in such a market. Such a rule would exempt all collective bargaining agreements concerning mandatory subjects, negotiated at arm's length, as well as union pressure tactics designed to achieve such agreements. More specifically, labor-management conduct that is permitted or required under the labor laws should not be proscribed by the antitrust laws. Labor-management conduct that is prohibited by the labor laws should be remedied exclusively under those laws. If the labor laws do not regulate conduct opposed to sound public policy, or if their remedies are inadequate, the solution should be to strengthen those laws rather than to invoke the antitrust laws. Finally, if labor-management conduct permitted or required by labor law is still to be sub-

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ject to antitrust, it should not be assessed under traditional antitrust principles; rather, a flexible rule of reason, allowing for the unique status of labor-management conduct, should be the standard of legality.

These are the tenets that I believe were intended by the authors of our national labor and antitrust policies, but from which recent cases have departed. The national labor policy, expressed in the Norris-LaGuardia and Wagner Acts, is that unionization and collective bargaining are to be promoted. Because the objective of a union is to monopolize access to labor, the consequence of the national labor policy is that competition among business, based upon wage rates, will be diminished. This is diametrically opposed to national antitrust policy, that combinations in restraint of trade are unlawful and market competition is to be encouraged.

Because of the conflicting goals of these policies, Congress and the courts created an exemption from the antitrust laws for union conduct — attempted monopolization of the labor market — which otherwise is a trade restraint. As the need for this symposium demonstrates, the precise parameters of the exemption have been debated incessantly and inconclusively for almost a century.

For the most part, unilateral union conduct — picketing, strikes, boycotts — has been adequately protected by the statutory exemption. But there has been considerable mischief in the courts concerning the "non-statutory" exemption for joint labor-management conduct. One of the basic reasons for this is that the seminal Supreme Court decisions on the antitrust exemption — Apex Hosiery Co. v. Leader and United States v. Hutcheson — dealt with unilateral union conduct, and thus one was left to surmise whether the principles there articulated apply equally to joint labor-management conduct. In particular, Justice Frankfurter's statement in Hutcheson that the exemption applied "[s]o long as a union acts in its self-interest and does not combine with non-labor groups" has been a source of much confusion. "Combining" has a certain connotation in antitrust, and from an antitrust perspective a collective bargaining agreement is prima facie proof of a combination in restraint of trade. But as labor lawyers know, a collective bargaining agreement is normally a compromise of competing interests, not a conspiracy of common interests.

3. 310 U.S. 469 (1940).
4. 312 U.S. 219 (1941).
5. Id. at 232.
To me it makes no sense, as Professor Milton Handler and I argue in our recent articles on this subject,\(^6\) that unilateral union conduct intended to monopolize the labor market and to standardize the price of labor through the spread of collective bargaining, should be immune from antitrust, but that the same objective of the conduct — the collective bargaining agreement itself — should be rendered subject to antitrust precisely at the moment of the union's greatest triumph. Unfortunately, this has not been the prevailing view.\(^7\)

**II. THE Apex-Hutcheson-Allen Bradley TRILOGY**

*Apex, Hutcheson, and Allen Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*\(^8\) are landmark decisions that compel the inference that union-employer conduct, in particular collective bargaining, enjoys an unqualified antitrust exemption equal to that for unilateral conduct.

In *Hutcheson*, the Court ruled that the Clayton and Norris-LaGuardia Acts must be read together, and thus that those union actions which are immune from injunction under the labor laws, are also immune from treble damages and criminal prosecution under the antitrust laws. This is the "statutory" exemption for conduct otherwise arguably violative of the Sherman Act.

In *Apex*, in contrast, the Court looked to the purpose and scope of the Sherman Act, and ruled that union conduct in furtherance of traditional union objectives, even if violative of other laws, was not a type of trade restraint meant to be covered by that Act. Unions were accorded not merely an exemption; the Sherman Act simply did not apply.

In *Allen Bradley*, the Court held that the exemption did not extend to union participation in an employer conspiracy to monopolize and fix prices in the commercial market. Even *Allen Bradley*, though, suggests that an arm's length collective bargaining agreement imposing comparable restraints on the market would be exempt. The distinction then would be based upon the parties' re-

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7. Cf. Mid-America Regional Bargaining Ass'n v. Will County Carpenters District Council, 675 F.2d 881 (7th Cir.), cert. denied, 103 S. Ct. 132-33 (1982) (commenting that collective bargaining agreements on mandatory topics are subject to the statutory exemption).

8. 325 U.S. 797 (1945).
spective motivations.

In short, the *Apex-Hutcheson-Allen Bradley* trilogy must be viewed as limiting antitrust's scope to plainly anticompetitive conduct while exempting bona fide union-employer collective bargaining agreements. I believe it was so viewed prior to *United Mine Workers v. Pennington* and *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*

III. *Pennington and Jewel Tea*

The Supreme Court's 1965 opinions in *Pennington* and *Jewel Tea* first tampered with this trilogy. Language in both opinions has been interpreted as circumscribing the labor exemption articulated in *Apex* and *Hutcheson*, as it applies to joint conduct. This laid the groundwork for the perverted notions, later set out expressly in *Connell*, that collective bargaining agreements deserve a lesser, "nonstatutory" exemption, and that labor law remedies are not necessarily exclusive, at least with regard to joint labor-management conduct.

In *Pennington*, the Court held that an agreement concerning wages — normally a mandatory subject — but directed at competitors of the employer, and thus the wages of other bargaining units, is not exempt. More specifically, a union could not agree with one set of employers to impose wage standards on competitors. By giving up its bargaining flexibility, the Court added, the union forfeited its antitrust exemption.

*Pennington* has been read to stand for three principles: first, that an agreed-upon restraint on its freedom of action lifts a union's labor exemption; second, that predatory intention motivating the agreement gives rise to antitrust liability; and, third, and most important, "an agreement resulting from union-employer negotiations is [not] automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement."

I have a somewhat different interpretation of *Pennington* that I would like to share with you. The agreement that was challenged in *Pennington* at bottom was not at all over a mandatory subject, but a permissive one only. As Justice White noted in his opinion,

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11. *Id.* at 644-65.
bargaining is not mandated over the subject of terms and conditions in other bargaining units. Yet that was precisely the purpose of the agreement in *Pennington*. Thus, *Pennington* can be distinguished as involving an agreement on a non-mandatory subject. Under those circumstances there clearly is no antitrust exemption. Moreover, since there was evidence of a conspiracy to destroy competitors, *Pennington* can also be viewed simply as a reaffirmation of *Allen Bradley*.

As to *Jewel Tea*, again there is a commonly accepted interpretation and another which, as with *Pennington*, would fit the decision nicely into the mainstream of *Apex-Hutcheson-Allen Bradley*. In *Jewel Tea*, the Court held that a clause restricting the commercial marketing hours of employers was immune from antitrust, because the subject was “intimately related” to the union’s legitimate interest in the working hours of its members, in that marketing hours were determinative of working hours. In saying that the agreement was “intimately related,” Justice White misled many people into thinking that the scope of the exemption for collective bargaining agreements was not congruent with the scope of mandatory bargaining under the labor laws, but only some smaller area of “intimate relation.” In fact, commercial marketing hours would normally be considered a non-mandatory bargaining subject; however, in *Jewel Tea*, they were “intimately related” to the mandatory subject of the hours of labor. Therefore, Justice White in fact was expanding the scope of the exemption beyond mandatory subjects to include a normally non-mandatory subject. It would have been more illuminating if Justice White had stated that under the circumstances marketing hours would be considered a mandatory bargaining subject for purposes of assessing the labor exemption.

In any case, while one can attempt to construe *Pennington* and *Jewel Tea* to be consistent with the *Apex-Hutcheson-Allen Bradley* tradition, this has not been the prevailing view of these opinions, certainly not in the Supreme Court. Synthesizing *Pennington* and *Jewel Tea*, a collective bargaining agreement on a mandatory subject will appear to enjoy antitrust immunity only if the union had pursued the agreement in its own self-interest; the subject of the agreement is “intimately related” to matters of “immediate and direct” union concern — conditions of employment — and not matters, such as price, that are of only indirect concern and which

12. *Id.* at 689.
restrain the product market in "direct and immediate" fashion; and, the agreement does not impair the freedom of contract of the parties in their relations with third parties.

*Pennington* and *Jewel Tea* thus created a situation where mandatory bargaining, compelled under labor law, can lead to liability under antitrust law.

**IV. Connell Construction**

With this background, the Court in 1975 approached the facts in *Connell*. While *Connell* involved a non-collectively bargained agreement, Justice Powell reminded us that the newly christened "non-statutory" exemption for joint labor-management conduct created by *Pennington* and *Jewel Tea* was more limited — less absolute and less compelling — than the statutory exemption.

What elements has *Connell* contributed to the non-statutory exemption? *Connell* has not only cast serious doubt on the continued vitality of *Apex-Hutcheson-Allen Bradley*, but has been even more pernicious in its impact than *Pennington* and *Jewel Tea*. Briefly, in *Connell*, the Court denied an antitrust exemption to an agreement between Connell, a general contractor in the construction industry, and a union representing employees in the plumbing trade. The agreement required Connell to subcontract only to contractors who recognized the Plumbers' Union. Such an agreement, in effect, calls for a secondary boycott, a "hot cargo" agreement. Such agreements are prohibited as unfair labor practices under section 8(e) of the National Labor Relations Act (NLRA), added in 1959 as part of the Landrum-Griffin Amendments.13

Justice Powell seemed to approach the legal issue from two separate directions. He ruled in the first part of his opinion that the agreement was subject to antitrust liability because it had a direct impact on commercial competition — it imposed a boycott on non-union contractors — and because it was not part of a collective bargaining agreement. That the overall objective of the boycott was a traditional union organizational objective — to monopolize access to the labor market — and was not the product of an anti-competitive combination, as in *Allen Bradley*, did not influence the Court. In the second half of his opinion, Justice Powell ruled that the agreement was an unfair labor practice, but nevertheless could also be subject to an antitrust suit. His notion that the NLRA was not the exclusive remedy for an unfair labor practice

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had no foundation in prior law.

In ruling that dual remedies were permissible, Justice Powell relied on the silence of the Landrum-Griffin Act as to a possible antitrust exemption for hot cargo agreements, construing this silence as permitting antitrust liability. As we demonstrated through a series of hypotheticals in our article this premise was faulty. Hot cargo agreements, and secondary union activity with the same market impact, were both immune from antitrust after Hutcheson. Thus, Congressional silence, if anything, should have been construed the other way, as condoning a continued exemption. From an antitrust perspective, because the market impact of a secondary boycott and a hot cargo agreement requiring a boycott is identical, the antitrust consequences should be the same. But Connell sets up the situation where a boycott agreement that violates section 8(e) may violate the antitrust laws; whereas, secondary conduct or an agreement lawful under section 8(e), remains immune solely for the reason that there is no violation of labor law.

Connell left certain issues unresolved. First, does the notion that a restraint’s direct market impact lifts the exemption apply to collectively-bargained agreements, including, for example, one that violates section 8(e) and thus cannot be considered an agreement over a mandatory subject? Second, when the challenged conduct is a form of boycott agreement governed by section 8(e), must the court rule upon the unfair labor practice question first, or defer to the Labor Board, before ruling on the exemption issue? Put another way, does the exemption rise and fall in tandem with the unfair labor practice finding?

A. Application of Connell to Collective Bargaining Agreements

As to the first issue, the case law is increasingly clear that Connell should be limited to its unique facts, and thus does not apply to collective bargaining agreements. Last term the Supreme Court in Woelke & Romero Framing Inc. v. NLRB uniformly limited Connell to its express facts for purposes of labor law, holding that a union signatory agreement identical to that in Connell but which had been collectively bargained between an employer and the union representing his employees, was not a violation of section 8(e). While Woelke & Romero does not comment upon the antitrust side of the coin, one can argue that by a parity of reasoning

15. 102 S. Ct. 2071 (1982).
an antitrust exemption would apply to the agreement. The Court recently denied certiorari in Swanson-Dean Corp. v. Seattle District Council of Carpenters, a case similar to Woelke & Romero, but where the petition raised this very issue. There are several court opinions, moreover, that have limited Connell to non-collectively bargained agreements. For example, Grandad Bread, Inc. v. Continental Baking Co., and California Dump Truck Owners Association v. Associated General Contractors, in the Ninth Circuit. Other decisions, however, notably Consolidated Express, Inc. v. New York Shipping Association (Conex), in the Third Circuit, have ruled that Connell applies across the board. This would add to the Pennington-Jewel Tea rubric the prerequisite that a collective bargaining agreement must not directly restrain commercial competition.

My own opinion is that the view limiting Connell should and will prevail, because of the strong national policy favoring collective bargaining. This would mean at a minimum that a collectively-bargained work preservation agreement, such as the one ruled lawful under section 8(e) in National Woodwork Manufacturers Association v. NLRB, and which by definition involves a mandatory subject, would be exempt, even though it imposes a direct restraint in the commercial market. Examples of direct restraint would be a prohibition on subcontracting of bargaining unit work, or a standard “successors and assigns” clause. It should also mean that the Connell rule allowing dual remedies only controls in a non-collective bargaining context: that is, a collectively-bargained hot cargo agreement in violation of section 8(e) nevertheless remains exempt from antitrust. There is little case law on this latter point; Conex, however, rejected this view.

B. Dual Remedies

As to the second issue, the relationship of antitrust and unfair labor practices, again the Supreme Court has recently spoken. In dictum, in Kaiser Steel Corp. v. Mullins, Justice White, in defiance of the laws of gravity, stated unequivocally: "In Connell, we decided the § 8(e) issue in the first instance. It was necessary to do

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16. 646 F.2d 376 (9th Cir. 1981), cert. denied, 102 S. Ct. 2903 (1982).
17. 612 F.2d 1105 (9th Cir. 1979), cert. denied, 449 U.S. 1076 (1981).
18. 562 F.2d 607 (9th Cir. 1977).
so to determine whether the agreement was immune from antitrust laws.”

This means that the application of antitrust to agreements arguably violative of section 8(e) — any form of boycott agreement, even if collectively bargained — will turn on the unfair labor practice finding. This is a nonsensical result, a gross distortion of the labor exemption. Contracts with identical market impact will be subject to the Sherman Act based upon technical distinctions in the labor laws. The folly of this approach is epitomized by the Conex litigation over the Rules on Containers in the shipping industry. The Third Circuit based a finding of antitrust liability on the unfair labor practice finding of the NLRB; however, the Supreme Court, in NLRB v. International Longshoremen’s Association, reversed the Board’s finding and subsequently vacated and remanded Conex. On remand to the Board, an Administrative Law Judge found that the Rules were not in fact violative of section 8(e); however, the Federal Maritime Commission asserted jurisdiction and condemned the Rules. What is the Third Circuit to do now?

The argument advanced for this bizarre result is that where the agreement violates the labor laws the national labor policy cannot justify an antitrust exemption. This is a trap, based upon ignorance of the underlying rationale for the exemption. Apex and Hutcheson made clear that the exemption applies to all union conduct with the traditional objective of monopolizing the labor market. Thus, the fact that conduct violates the labor laws does not answer the question critical to the existence of the exemption, namely, whether the union is motivated by a traditional objective, as opposed to aiding an employer to restrain a commercial market. If the union is pursuing a labor monopoly, then there should be an antitrust exemption. If the particular tactic employed by the union is pernicious, then the labor laws should regulate it.

It is most disturbing that virtually all of the decisions since Connell have piggy-backed the antitrust question on the unfair labor practice finding. Where an agreement is found to violate section 8(e), as in Conex and Larry V. Muko, Inc. v. Southwestern Penn-

22. Id. at 860.
sylvania Building & Construction Trades Council (Muko I),\textsuperscript{26} this has triggered rather than precluded an inquiry into the labor exemption. Where the exemption for agreements has been sustained, as in Berman Enterprises v. Local 333, United Mine Division, International Longshoremen's Association,\textsuperscript{27} Grandad Bread and Amalgamated Meat Cutters Local 576 v. Wetterau Foods, Inc.,\textsuperscript{28} the court has done so on the premise that the agreement was not an unfair labor practice, rather than the proper ground that the restraint should be regulated exclusively under labor law and was neither intended to nor had the effect of restraining commercial competition.

Perhaps when the Court reconsiders Connell this term in the course of reviewing California State Council of Carpenters v. Associated General Contractors of California,\textsuperscript{29} which raises the question whether Connell applies to an employer boycott of union contractors, it will at last see the error of its ways.

V. Post-Connell Status of Collective Bargaining Agreements

Whether labor-antitrust principles apply to collective bargaining depends upon whether Connell is deemed to apply. Where Connell is deemed applicable, market impact thus must be taken into account. In that event, it may be difficult to sustain many agreements on mandatory subjects which have direct market impact, including many clauses that effect a boycott, unless you may also fall back on the argument that the agreement is not an unfair labor practice. In this regard, one consolation of the decisions just mentioned is that they were not influenced by market impact to withhold an exemption. Where Connell is not deemed applicable, then we must revert to Pennington and Jewel Tea for guidance.

There have been few post-Connell cases involving collective bargaining agreements over subjects not regulated by section 8(e). Most have applied a unique amalgam of Pennington, Jewel Tea and Connell in assessing these agreements. Most cases have drawn a line based upon the mandatory versus non-mandatory distinction, finding no exemption applicable to the latter type of agreement. But this usually has been only the start of the inquiry. For

\begin{itemize}
\item \textsuperscript{26} 609 F.2d 1368 (3d Cir. 1979).
\item \textsuperscript{27} 644 F.2d 930 (2d Cir.), \textit{cert. denied}, 102 S. Ct. 506 (1981).
\item \textsuperscript{28} 597 F.2d 133 (8th Cir. 1979).
\item \textsuperscript{29} 648 F.2d 527 (9th Cir. 1980), \textit{cert. granted}, 102 S. Ct. 998 (1982).
\end{itemize}
example, in *Mackey v. National Football League*, the Eighth Circuit found three prerequisites to an exemption: first, a mandatory subject; second, arm's length bargaining; and third, that the restraint must "primarily affect only the parties to the collective bargaining relationship." I can hypothesize circumstances under which this latter factor would mean denying the exemption to an otherwise lawful work preservation agreement.

In *Ackerman-Chillingworth v. Pacific Electrical Contractors Association*, the Ninth Circuit suggested that an agreement on a mandatory subject might lose its exemption if it benefited the employer. Under this standard one could easily attach a traditional "most favored nations" clause. It is also intriguing to speculate how this standard would impact on the current phenomenon of concession bargaining, whereby many of the labor settlements being achieved in depressed industries are largely for the "benefit" of the employer.

VI. THE ROLE OF INTENT

There is an issue whether the intent of the parties is a relevant inquiry in ascertaining the existence of an exemption. Intention certainly should play a role in weighing a labor agreement under the rule of reason. Intention also plays an important role in assessing an exemption. Where an agreement is governed by section 8(e) and the dual remedy principle applies, intention is a threshold issue, in the sense that it usually is determinative of the unfair labor practice issue. For example, if the agreement is intended to preserve bargaining unit work, then the agreement is lawful under section 8(e) and appears to enjoy a labor exemption. Conversely, where the intention of the agreement is to acquire work and the agreement violates section 8(e), there is no labor exemption. The resolution of the unfair labor practice issue thus serves as the equivalent of a finding on intent.

As to agreements on mandatory subjects not governed by section 8(e), there is no clear expression in the case law that intent is an
essential inquiry, and indeed Connell suggests the contrary. However, I think one can read both Pennngton and Jewel Tea to imply that the motivations of the parties are at least as important as the effect of the agreement. The recent Mid-America Regional Bargaining Association v. Will County Carpenters District Council decision in the Seventh Circuit also strongly suggests that intention is a critical factor.

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The only reasonably clear principle is that agreements on mandatory subjects are not automatically exempt, while agreements on permissive subjects are not normally exempt. Beyond this the status of the exemption turns on consideration of the presence or absence of an unfair labor practice, market impact, impact on the parties' bargaining flexibility and on other bargaining units, and purpose or intent of the agreement.

What one statute compels another should not put asunder. Good faith agreements over mandatory subjects should be exempt from the antitrust laws. If a subject or agreement is repugnant to labor policy, then it should be outlawed under the labor laws. By the same token, contracts over non-mandatory subjects should be carefully scrutinized for anti-competitive intent and effect before the exemption is lifted. Subjecting collectively-bargained agreements to antitrust will create havoc in labor-management relations.

VII. STANDARD OF ANTITRUST ILLEGALITY

Assuming that a collective bargaining agreement is not exempt from antitrust, the question remains by what standard the agreement should be tested. The mere fact that an agreement is held subject to antitrust — for example, because of a quirk in section 8(e) of the labor laws — does not mean that the circumstances of its negotiation should be completely disregarded by the antitrust forum. Certainly agreements over permissive subjects, which are innocuous in most cases, should not willy-nilly be condemned as per se restraints without meaningful analysis of the purpose of the restraint as it relates to the labor relations context and its relationship to commercial competition. Rather, in general the rule of reason should be applied. In Muko II, while applying the rule of reason to the restraint in question, Judge Adams appeared to take

34. 675 F.2d 881 (7th Cir.), cert. denied, 103 S. Ct. 132-33 (1982).
issue with Professor Handler and me on this point. Actually there
is no difference between our positions. As Judge Adams astutely
observed, a per se rule should continue to apply to the Allen Brad-
ley type situation, and we did not mean to suggest otherwise. Be-
yond that, however, the non-commercial nature of collectively-bar-
gained agreements demands that they be measured under the rule
of reason.

VIII. Conclusion

I have probably raised more questions in your minds than I have
offered solutions. At a minimum, however, if Connell can be ar-
rested and limited in its influence, then we will at least have begun
moving the labor-antitrust exemption back in the direction of the
broad scope intended. This would certainly be a vast improvement
over the current state of the law, which has caused the parties to
collectively bargain nothing but confusion.
